82-188

No. .....

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In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF OKLAHOMA,
Petitioner,

v.

CECIL DEJUAN HARRIS,
Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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August, 1982

QUESTION PRESENTED FOR REVIEW

Whether the state court's ruling below, which held that an accused's Fifth Amendment right to remain silent is violated when he is cross-examined concerning why he has waited until trial to assert his exculpatory explanation (alibi defense), is in contravention of this Court's holding in *Fletcher* v. *Weir* and other recent decisions interpreting an accused's right to remain silent under the Fifth Amendment, which is applicable to the States through the Fourteenth Amendment?

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No. .....

In the
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OCTOBER TERM, 1982

STATE OF OKLAHOMA,
Petitioner,

v.

CECIL DEJUAN HARRIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals is reported as *Harris v. State*, ___ P.2d ___, 53 O.B.A.J. 1387 (Okl.Cr. May 28, 1982). See Appendix A.

JURISDICTION

Judgment of the Oklahoma Court of Criminal Appeals was entered on May 28, 1982. A timely petition for rehearing was filed June 3, 1982, and said application was denied on June 16, 1982. See Appendices B and C. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution states in pertinent part:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 28 U.S.C. § 1257(3) states:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

STATEMENT OF THE CASE

During the early morning of either April 4, or April 5, 1979, Janet Waldrop, a thirteen (13) year old minor, was awakened by her mother's boyfriend, the defendant, who had been living with her mother for the past year and a half (Tr. 41, 43). The mother, prior to this time, had already left the house for work (Tr. 43). After awakening the child, the defendant had her follow him to another bedroom where he sexually assaulted the child (Tr. 43-47). Neither the victim's two (2) sisters nor her brother, who were sleeping in the same bedroom with her, were awakened by the incident (Tr. 43). After the sexual assault, the child cleaned herself and went back to sleep (Tr. 48, 49).

The incident was not reported until days later on April 17, 1979, when Janet told one of her teachers about the incident after the teacher inquired as to whether she was upset about something (Tr. 49, 56, 57). On April 24, 1979, Janet was examined by a physician (Tr. 34). His findings were consistent with the child's allegations that she had had a previous sexual relationship (Tr. 36).

At trial, after the State had rested its case based upon the aforesaid facts, the defendant testified and, for the first time, proffered an alibi defense. The defendant alleged that during the week of April 2 through April 6 he left the home in the early morning each day (approximately between 5:00 a.m. and 5:30 a.m.) because he and his partner had to attend to some out-of-town business (Tr. 286, 287). The defendant also offered credit card gas receipts to bolster this defense (Tr. 307, 310). Although the defendant alleged that he drove his pickup truck on these trips accompanied by his partner, the gasoline receipts contained the license tag number of his partner's car, and not the tag number of the defendant's pickup truck. Thus, the receipts did not contain any evidence which would verify the defendant's presence at the time of the purchases, even though the defendant's partner did testify and verify the defendant's story (Tr. 205-209). The defendant, however, admitted that on two of these mornings, he had left the home after the mother had left for work (Tr. 305).

On cross-examination, the prosecuting attorney questioned the defendant in the following manner with regard to his alibi:

> "Q. You've got all these receipts and you knew that you were out of town every day with Olen. Why didn't you save yourself all this grief and come forward with this evidence and save this whole proceeding?
>
> A. I keep saying it, I didn't understand when this charge was. That is why we pulled receipts for ten months.
>
> BY MR. WARREN: Just answer the question, Bud.

BY THE WITNESS: Yes sir.

Q. (By Mr. Armstrong) When did you first learn that it was the first week of April that you allegedly committed this act?

A. The Preliminary Hearing.

Q. All right. That was in June; is that correct?

A. Yes, sir.

Q. Why haven't you come forward between June and now and saved yourself this ordeal?

A. To keep you from changing the date to a different date."
(Tr. 307, 308).

No objections were made by the defense counsel to this line of questioning by the prosecuting attorney. In fact, on redirect examination the defense counsel continued this line of questioning:

"Q. (By Mr. Warren) All right, Mr. Armstrong asked you why you did not come forward. Has this information been provided at the request of an attorney? I'm talking about the receipts and all this business establishing the days.

A. Yes.

Q. In fact, I requested them myself once we found out what week they were talking about.

A. Yes, sir.

Q. And did you rely solely upon what I told you to do from there on?

A. Yes, sir.

Q. Did I, at any time, mention to you to bring this stuff down to the District Attorney's Office?

A. No, sir.

Q. In fact, I told you, correct me if I am wrong, I told you, let's hang onto the receipts and all this business so that we have got it established because the dates may change if we don't.

A. Yes, sir.

Q. And, in fact, I told you that at the Preliminary Hearing; is that correct?

A. Yes, sir."
(Tr. 310, 311).

Thereafter, the case was submitted to the jury, who found the defendant guilty and assessed punishment at five (5) years imprisonment. The defendant asserted on appeal that the prosecutor's questioning regarding the defendant's post-arrest silence was a denial of due process as guaranteed by the Oklahoma Constitution and the United States Constitution, although he never objected at trial to this questioning and, in fact, continued this line of questioning on redirect examination. The Oklahoma Court of Criminal Appeals reversed and remanded the case for a new trial, holding that the questioning of the defendant by the prosecuting attorney concerning why the defendant had waited until trial to assert his alibi defense was "a direct assault on the [defendant's] exercise of his right to remain silent." *Harris*, 53 O.B.A.J. at 1388. The Oklahoma Court of Criminal Appeals based its reversal upon the Fifth Amendment to the United States Constitution rather than upon state grounds. The Oklahoma Court of Criminal Appeals stated in its opinion:

"Although we have not had occasion to address the precise issue, it seems clear to us that any comment or reference to a defendant's pre-trial silence is an improper infringement on the defendant's right against self-incrimination. The Fifth Amendment to the United States Constitution allows an accused to remain silent during every stage of a criminal proceeding. *Miranda* v. *Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966). He may not be coerced into relinquishing this right to silence by any means, either physical or mental. *Id.* at 448. Nor may any penalty be exacted for an accused's failure to give up his right to remain silent. *Griffin* v. *California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)." *Harris*, 53 O.B.A.J. at 1387.

The State filed a Petition for Rehearing on June 10, 1982, requesting the Oklahoma Court of Criminal Appeals to reconsider its opinion in light of this Court's decision in *Fletcher* v. *Weir*, 50 U.S.L.W. 3762 (1982), since, as in *Weir*, the defendant here was not given any governmental assurances that his pre-trial silence would not be used against him, and in light of other recent decisions of this Court interpreting whether an accused's right to remain silent has been violated by cross-examination of the accused concerning his post-arrest silence.

REASON FOR GRANTING THE WRIT

THE STATE COURT'S RULING IN THIS CASE, WHICH HELD THAT AN ACCUSED'S FIFTH AMENDMENT RIGHT TO REMAIN SILENT IS VIOLATED WHEN HE IS CROSS-EXAMINED CONCERNING WHY HE HAS WAITED UNTIL TRIAL TO ASSERT HIS EXCULPATORY EXPLANATION, IS IN CONTRAVENTION OF THIS COURT'S HOLDING IN *FLETCHER* v. *WEIR* AND OTHER RECENT DECISIONS INTERPRETING WHETHER AN ACCUSED'S RIGHT TO REMAIN SILENT UNDER THE FIFTH AMENDMENT, WHICH IS APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT, HAS BEEN VIOLATED WHEN THE ACCUSED IS CROSS-EXAMINED CONCERNING HIS POST-ARREST SILENCE.

The Oklahoma Court of Appeals in its opinion in *Harris* v. *State*, ___ P.2d ___, 53 O.B.A.J. 1387 (Okl.Cr. March 28, 1982), concluded that the defendant was denied due process of law guaranteed by the Fourteenth Amendment when the prosecutor used the defendant's post-arrest silence for impeachment purposes. The state appellate court phrased the issue as a constitutional issue, although it did not appear from the record that the defendant was immediately read his *Miranda* warning:

> "Although we have not had occasion to address the precise issue, it seems clear to us that any comment or reference to a defendant's pre-trial silence is an improper infringement on the defendant's right against self-incrimination. The Fifth Amendment to the United States Constitution allows an accused to remain silent during every stage of a criminal proceeding. *Miranda* v. *Arizona*, 384 U.S. 435, 467, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966). He may not be coerced into relinquishing this right to silence by

> any means, either physical or mental. *Id.* at 448. Nor may any penalty be exacted for an accused's failure to give up his right to remain silent. *Griffin* v. *California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)."
>
> *Harris*, 53 O.B.A.J. at 1387.

Moreover, the state court held:

> "The prosecutor's questions in this case were more than the tangential infringement upon Fifth Amendment rights which occurred in *Runnels* and *Boomershine*. Rather, they were a direct assault on the appellant's exercise of his right to remain silent." *Id.* at 1388.

The opinion by the Oklahoma Court of Criminal Appeals directly conflicts with this Court's opinion in *Fletcher* v. *Weir*, 50 U.S.L.W. 3762 (1982), and for that reason this Writ should be granted.

This Court in *Fletcher* v. *Weir*, 50 U.S.L.W. 3762 (1982), determined that the Court of Appeals in that case "gave an overly broad reading" to the Court's decision in *Doyle* v. *Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), because the Court of Appeals concluded that a defendant could not be impeached by the use of his post-arrest silence even if no *Miranda* warnings had been given. In *Doyle*, this Court had ruled that its decision in *United States* v. *Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975), extends to state criminal prosecution, and thus, the Court held that due to the nature of a *Miranda* warning it would be a violation of due process for the states to allow comment on silence which the warnings may well have encouraged. In *Weir*, this Court again took the oppor-

tunity to reiterate that "[the Court has] consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him." *Weir*, 50 U.S.L.W. at 3762. "In the absence of the sort of affirmative assurance embodied in the *Miranda* warnings," the Court held, no constitutional impropriety occurs in permitting cross-examination concerning post-arrest silence when a defendant chooses to take the stand. *Id.* at 3762-63.

Like the Court of Appeals in *Weir*, the Oklahoma Court of Criminal Appeals here, has also given the defendant's rights under the Fifth Amendment an "overly broad reading" because in the instant case, as in *Weir*, the record is void of any evidence that the defendant was given the *Miranda* warning immediately at the time of his arrest, or any other governmental assurances that his silence would not be used against him. Further, the state appellate court's statements that, "any comment or references to a defendant's pre-trial silence is an improper infringement on the defendant's right against self-incrimination" and the "Fifth Amendment . . . allows an accused to remain silent during every stage of a criminal proceeding" are similar to the Court of Appeals' statement in *Weir*, that, "it is inherently unfair to allow cross-examination concerning post-arrest silence," which this Court has rejected as an inaccurate statement of the protection afforded to the accused by the Fifth Amendment. *Weir*, supra.

Evidently, like the Court of Appeals in *Weir*, the Oklahoma appellate court incorrectly surmised that "an arrest, by itself, is governmental action which implicitly in-

duces a defendant to remain silent." *Weir*, 50 U.S.L.W. at 3762.[1]

The facts of the instant case and *Weir* are remarkably similar. In both cases, the records do not indicate that any governmental assurances were given to the defendants that their silence would not be used against them and the cross-examinations concerned instances where the defendants' in-court statements represented the first occasions at which the defendants had offered their exculpatory explanations to the charges. There can only be one conclusion that the Oklahoma court's decision below in the instant case stands in conflict with this Court's decision in *Fletcher* v. *Weir*.

Moreover, the purpose of the questioning in the instant case was not designed to draw meaning from the defendant's silence itself, but rather was meant to test the veracity of the defendant's exculpatory explanation. See *Anderson* v. *Charles*, 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed. 2d 222 (1980). Thus, as asserted by the State in its Petition for Rehearing, the threshold issue is not the defendant's right to remain silent, but rather, is the credibility of the defendant's exculpatory explanation which he had asserted for the first time at trial.

To conclude, although the Oklahoma court may formulate its own evidentiary ruling regarding the issue here,

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[1] For another case which evidences an overly broad reading given to an accused's rights under the Fifth Amendment by the Oklahoma appellate court, see *State* v. *Neal*, 604 P.2d 145, 146-47 (Okl.Cr. 1979), wherein the Oklahoma court stated:

"It is clear that there are no circumstances under which impeachment by reference to a defendant's silence is a constitutional procedure."

see *Weir*, supra, the court below chose to rule based upon federal constitutional law. Thus, since the decision below is in direct conflict with this Court's interpretation of constitutional law on the same point, as pronounced by this Court in *Fletcher* v. *Weir* and other post-*Doyle* decisions of the Court, see *Jenkins* v. *Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), and *Anderson* v. *Charles*, 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980), this Court should grant the petitioner's request for a Writ of Certiorari in order to correct the Oklahoma court's misinterpretation of federal constitutional law on this issue regarding an accused's right to remain silent under the Fifth Amendment. In fact, just recently, in *United States ex rel. Smith* v. *Franzen*, 660 F.2d 237 (7th Cir. 1981), *cert. granted and remanded, sub nom. Lane* v. *Smith*, 50 U.S.L.W. 3963 (1982), a case factually similar to the case at bar, this Court granted certiorari and remanded the case to the court below for reconsideration in light of *Fletcher* v. *Weir*, 50 U.S.L.W. 3762 (1982). Accordingly, the petitioner respectfully requests the Court to grant certiorari in the instant case.

CONCLUSION

While Rule 17 of this Court, by its own terms, is not exclusive in setting out grounds for the exercise of the Court's discretionary jurisdiction, as requested here, it does provide guidance to the importance of the cases this Court will consider. As indicated by the petitioner's argument hereinbefore stated, the petitioner has asserted one of the reasons enumerated in Rule 17 for exercising this Court's discretionary jurisdiction, in that, the petitioner contends that the Oklahoma appellate court has decided a substan-

tial federal question in conflict with applicable decisions of this Court. Consequently, as in *Lane* v. *Smith*, supra, certiorari should be granted in the instant case.

Respectfully submitted,

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APPENDIX A

[Oklahoma Bar Journal pp. 1387-1388]

HARRIS v. STATE
No. F-80-305. May 28, 1982.

CORNISH J. The appellant, Cecil Dejuan Harris, was tried and convicted in Cleveland County District Court, Case No. CRF-79-298, for Rape in the First Degree. The jury set punishment at five (5) years imprisonment.

The State's case-in-chief consisted mainly of the uncorroborated testimony of J.C.W., the appellant's thirteen-year-old stepdaughter. She testified that early one morning during the first week of April, 1979, the appellant had awakened her and had her follow him back to his bedroom. Once there, the appellant and the young girl engaged in sexual intercourse.

In his defense, the appellant offered the testimony of several witnesses tending to show his good character and an alibi that he was out of town on the day the incident occurred. He bolstered this defense with credit card receipts allegedly received on the day in question.

The appellant raises several assignments of error concerning the sufficiency of the evidence, improper prosecutorial comment on his silence, and evidentiary harpoons thrown at both the trial and preliminary hearing. Our disposition of the case requires us to address only the propriety of the prosecutor's comments.

During cross-examination of the appellant at trial, the following exchange occurred:

> Q. You've got all these receipts and you knew that you were out of town every day with Olen. Why didn't you save yourself all this grief and come forward with this evidence and save this whole proceeding?

A. I keep saying it, I didn't understand when this charge was. That is why we pulled receipts for ten months.

* * *

Q. When did you first learn that it was the first week of April that you allegedly committed the act?

A. The Preliminary Hearing.

Q All right. That was in June; is that correct?

A. Yes, sir.

Q. Why haven't you come forward between June and now and saved yourself this ordeal?

A. To keep you from changing the date to a different date.

The prosecutor continued this approach throughout the cross-examination and during closing argument. However, we confine our discussion to the above-quoted remark.

The State does not contest the impropriety of this remark, but argues it was waived by the appellant's failure to object. This argument finds support from our decisions in *Runnels* v. *State*, 562 P.2d 932 (Okl.Cr.1977) and *Boomershine* v. *State*, 634 P.2d 1318 (Okl.Cr.1981).

Although we have not had occasion to address the precise issue, it seems clear to us that any comment or reference to a defendant's pre-trial silence is an improper infringement on the defendant's right against self-incrimination. The Fifth Amendment to the United States Constitution allows an accused to remain silent during every stage of a criminal proceeding. *Miranda* v. *Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966). He may not be coerced into relinquishing this right of silence by any means, either physical or mental. *Id.* at 448. Nor may any penalty be exacted for an accused's failure to give up his right to remain silent. *Griffin* v. *California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

The prosecutor's cross-examination in the instant case imposed a penalty for the appellant's failure to waive his right of silence. By pointing out the appellant's failure to provide state officials with his alibi evidence prior to trial, the prosecutor urged the jury to draw an advere inference from the appellant's silence. Thus, the State has effectively conveyed a warning to the appellant, as well as to other defendants in criminal trials, that they must present the State with their alibi at the time of their arrest or risk having their failure to do so used against them at trial.

Moreover, the penalty exacted for the appellant's silence is made no more palatable by the fact that the alibi evidence in this case consisted of documents instead of statements by the accused. In *Fisher* v. *United States*, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976), the Supreme Court noted that the production of documents by an accused may have "communicative aspects" which give rise to the protections of the Fifth Amendment. This may occur where the production of the documents tacitly concedes their existence or involves their identification by the accused. *Id.* at 410.

Here, production of the appellant's alibi evidence not only required him to identify and to authenticate the documents, but to inform state officials of the connection between the documents and his assertion that he was out of town on the days in question. The documentary evidence was apparently insufficient to establish that fact without some testimony by the appellant. Accordingly, we hold that under the instant circumstances, the prosecutor's inquiry as to the reasons for the appellant's pretrial silence was improper.

In view of the appellant's failure to object to the prosecutor's questions, however, it must still be determined whether the error was waived. We hold that it was not.

In *Runnels* v. *State*, supra, we held that an indirect comment on a defendant's failure to take the stand did

not rise to the level of fundamental error. Similarly, in *Boomershine* v. *State*, supra, we declined to reverse defendant's conviction on the basis of the prosecutor's comment on the defendant's failure to deny the charges while on the stand. Citing *Runnels*, we held that the error was not fundamental and had been waived by the defendant's failure to object. Thus, under these decisions, some conduct by the State in derogation of a defendant's Fifth Amendment rights is subject to being waived, if not objected to.

It is manifest, however, that at some point the prosecutor's conduct so impinges a defendant's right of silence that it may not be waived. We believe the circumstances of the instant case do rise to the point of *fundamental* error. The prosecutor's questions in this case were more than the tangential infringement upon Fifth Amendment rights which occurred in *Runnels and Boomershine*. Rather, they were a direct assault on the appellant's exercise of his right to remain silent. Under these circumstances, we refuse to overlook the error merely because of defense counsel's failure to object. Accordingly, we are compelled to reverse the judgment and sentence and remand for a new trial.

Appeal from District Court, Cleveland County; Alan J. Couch, Dist. Judge.

CECIL DEJUAN HARRIS, appellant, was convicted of Rape in the First Degree in Cleveland County District Court, Case No. CRF-79-298, was sentenced to five (5) years imprisonment, and appeals. REVERSED and REMANDED.

J. Malone Brewer, Oklahoma City, attorney for appellant.

Jan Eric Cartwright, Atty. Gen., Susan Talbot, Asst. Atty. Gen., Chief Criminal Appellate Division, Oklahoma City, attorneys for appellee.

BRETT, P.J., concurs.

BUSSEY, J., dissents.

BUSSEY, J. (Dissenting). From the record it would appear that the defendant welcomed the opportunity to explain why he had not disclosed his alibi to the police concerning his whereabouts on the day of the alleged rape. His explanation was that he did not reveal his presence outside the State (alibi) for fear that the State would change the date of the alleged offense, thus nullifying his defense. This explanation, by implication, placed in issue the good faith of the State. Had such explanation raised a reasonable doubt of the good faith of the prosecution and the guilt of the defendant the tactic of not objecting would have been successful. It is well established that failure to object to evidence of other crimes, hearsay evidence and the failure to object to the introduction of the fruits of an unlawful search and seizure constitutes a waiver to raise these issues on appeal and I see no difference between these errors and the error now complained of. Therefore, I must respectfully dissent. Failure to object to the questions of the prosecutor constituted a waiver of the right to raise this issue on appeal.

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

[Filed June 3, 1982]

CECIL DEJUAN HARRIS, Appellant,	)	
v.	)	No. F-80-305
THE STATE OF OKLAHOMA, Appellee.	)	

PETITION FOR REHEARING

COMES NOW, the Attorney General, Jan Eric Cartwright, by and through Assistant Attorney General, Susan Talbot, Chief, Appellate Criminal Division and requests this Court to reconsider its opinion in this case, which was filed May 28, 1982.

GROUNDS FOR PETITION FOR REHEARING

1. Appellant Harris, herein referred to as the defendant, failed to object to the State's examination of the Defendant in regards to his failure to produce prior to trial the credit card receipts allegedly received on the day this crime was committed. This Court has consistently held that the defense cannot "lay behind the log" and allow error to occur but rather defense counsel must make a timely objection to preserve error. This applies to alleged error with regard to the comments on the Defendant's silence, also. See *Boomershine* v. *State*, 634 P.2d 1318 (Okl. Cr. 1981); *Runnels* v. *State*, 562 P.2d 932 (Okl.Cr. 1977), *cert. denied*, 434 U.S. 893, 98 S.Ct. 270, 54 L.Ed.2d 179 (1977). See also *Goforth* v. *State*, 595 P.2d 813 (Okl.Cr. 1979).

In fact, only four (4) days prior to this decision, this Court in *Adams* v. *State*, ___ P.2d ___, 53 OBAJ ___ (Okl. Cr. May 24, 1982) stated:

> In his first and second assignments of error, the Defendant agrees that improper rebuttal and cross-examination occurred when the prosecutor noted the defendant's silence and his failure to proclaim his innocence at the time of his arrest. The complained of questioning took place after the defense had produced a witness, Don Roberts, who claimed that all the contraband was his. Since the record is void of any objection to the interrogatories or of a motion for a new trial, the errors have not been preserved, and thus have been waived. *Boomershine* v. *State*, 634 P.2d 1318 (Okl.Cr. 1981); *Runnels* v. *State*, 562 P.2d 932 (Okl.Cr. 1977), certiorari denied 434 U.S. 893, 98 S.Ct. 270, 54 L.Ed.2d 179."

This conclusion in *Adams* is inconsistent with the present holding. Accordingly, this case should be reconsidered to be in conformity with *Adams* and the cited cases.

2. Further, the defense cured any alleged error by questioning the Defendant on his reason for not coming forward:

> "Q (By Mr. Warren) All right, Mr. Armstrong asked you why you did not come forward. Has this information been provided at the request of an attorney? I'm talking about the receipts and all this business establishing the days.
>
> "A Yes.
>
> "Q In fact, I requested them myself once we found out what week they were talking about.
> "A Yes, sir.
>
> "Q And did you rely solely upon what I told you to do from there on?
>
> "A Yes, sir.
>
> "Q Did I, at any time, mention to you to bring this stuff down to the District Attorney's Office?

"A No, sir.

"Q In fact, I told you, correct me if I am wrong, I told you, let's hang onto the receipts and all this business so that we have got it established because the dates may change if we don't.

"A Yes, sir.

"Q And, in fact, I told you that at the Preliminary Hearing; is that correct?

"A Yes, sir. (Tr. 310, 311)

This Court has repeatedly held that a party may not complain of error which he himself has invited or which he has waived. *Goodrich* v. *State*, 533 P.2d 219 (Okl.Cr. 1976); *Lung* v. *State*, 420 P.2d 158 (Okl.Cr. 1966); *Williams* v. *State*, 373 P.2d 84 (Okl.Cr. 1962).

3. Moreover, the Defendant received a minimum sentence for Rape in the first degree and this impeachment was merely cumulative and not detrimental to the Defendant in light of the similar impeachment of other witnesses and the Defendant's answer which impeached the State's credibility. Therefore, in view of the fact that this statement, even if improperly admitted, did not attribute adversely to the defendant's conviction, any alleged error was harmless. *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). See *Goodwin* v. *State*, 625 P.2d 1262, (Okl.Cr. 1981); *Holdge* v. *State*, 586 P.2d 744 (Okl.Cr. 1978); *Youngs* v. *City of Tulsa*, 563 P.2d 156 (Okl.Cr. 1977). Further, the State submits that in view of the testimony presented during the State's case-in-chief, the jury would not have found the State's case significantly less persuasive had this cross-examination been excluded. Thus, if error occurred, it was at most harmless. See *Hall* v. *State*, ___ P.2d ___, 52 O.B.A.J. 2389 (Okl.Cr. October 7, 1981); *White* v. *State*, 607 P.2d 713 (Okl.Cr. 1980).

[APPENDIX]

In *Hall* v. *State*, supra, this Court affirmed a case which contained similar examination, which *was* followed by a proper objection:

> 'The appellant's silence was again referred to in closing argument when the prosecutor state that the arresting officer had '[taken] *a statement' from the appellant at which time appellant had not mentioned that the deceased was carrying a gun.* In *Burroughs* v. *State*, 528 P.2d 714 (Okl.Cr. 1974), we held:
>
> " 'There is a presumption that error of this kind is prejudicial, and in reviewing a case it becomes necessary for this Court to give full consideration to the record and determine whether said presumption has been overcome and that prejudice did not result.
>
> " 'We have thoroughly reviewed the record and find that the presumption of prejudice arising from the comments on the appellant's post *Miranda* silence was cured. The appellant's self defense theory was heavily discredited by the State in the case-in-chief and on rebuttal. Hall's own testimony was that he killed the victim as he sought to flee. Additionally, the improper comments followed testimony that Hall confessed the killing to officers at the scene. He was given Miranda warnings. It is readily apparent that the appellant was silent about his self-defense theory even before the Miranda warnings were given. Therefore, we hold that the remarks in question did not significantly add to the adverse inferences to be drawn.' " [Emphasis added].

As in *Hall*, the questioning in this case did not significantly add to the adverse inferences to be drawn. However, *Hall* is also distinguishable because the prosecutor impeached the defendant's *post Miranda silence* in *Hall*. In this case, it was only *post arrest silence*.

4. In *Fletcher* v. *Weir*, 30 Cr.L. 1093 (3/22/82), the defendant was cross-examined by the prosecutor as to why he had, when arrested, failed to advance an exculpatory explanation to the arresting officers or disclosed the location of the knife he used in self defense. The Court of Appeals for the Sixth Circuit concluded that the defendant was denied due process of the law because the defendant's *post arrest silence* was used for impeachment purposes.

The Supreme Court of the United States held that the distinguishing difference between *Fletcher and Doyle* v. *Ohio*, 426 U.S. 610 (1976) was that the record did not indicate that the defendant received any *Miranda* warnings during the period he remained silent after his arrest. Thus, there was no proof that the government induced silence by implicitly assuring the defendant that his silence would not be used against him and therefore, cross-examination of the defendant's *post arrest silence* did not violate due process.

In the present case, there is no record that the defendant ever received *Miranda* warnings nor proof that the State induced the defendant's silence by affirmative government assurances. In the absence of such evidence, the present cross-examination did not violate due process of law and in light of *Fletcher* this Court's statements in the opinion that "*any* comment or reference to a defendant's pre-trial silence is an improper infringement to the defendant's right against self-incrimination" and that "the Fifth Amendment to the United States Constitution allows an accused the right to remain silent during *every* stage of a criminal proceeding" are not in conformity with the United States Supreme Court's holding in *Fletcher*. Therefore, this petition for rehearing should be considered by this Court in order for this opinion to meet the standards set forth in *Fletcher*.

5. The threshold issue in this case, is not the Fifth Amendment and the defendant's right to silence but rather the issue of credibility. The primary objective of the Criminal Justice system must be the search for the truth and

when the defendant takes the stand in his own behalf this search for the truth should not be limited unnecessarily. The Supreme Court of the United States has not unnecessarily limited this search and neither should this Court. See *Fletcher*, supra; *Anderson* v. *Charles*, 447 U.S. 404 (1980); *Jenkins* v. *Anderson*, 447 U.S. 231 (1980). See also *State* v. *Neal*, 604 P.2d 145 (Okl.Cr. 1979), (where this Court stated in dicta that "it is clear that there are no circumstances under which impeachment by reference to a defendant's silence is a constitutional procedure").

In the present case, the prosecutor's comment was designed to refute the defendant's story and not to draw attention to the defendant's right to silence. In fact, any inference to the defendant's silence was so subtle that it failed to draw the defense counsel's attention and therefore should be held to be waived, although such was not constitutional or fundamental error.

CONCLUSION

For the reasons stated, the State, respectfully requests this Honorable Court to grant the State's Motion for Rehearing.

Respectfully submitted,

JAN ERIC CARTWRIGHT
ATTORNEY GENERAL OF OKLAHOMA

(s) *Susan Talbot*
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ATTORNEYS FOR APPELLEE

[Certificate of Mailing omitted]

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

[Filed June 14, 1982]

CECIL DEJUAN HARRIS, Appellant,	)	
v.	)	No. F-80-305
THE STATE OF OKLAHOMA, Appellee.	)	

ORDER DENYING PETITION FOR REHEARING AND DIRECTING THE ISSUANCE OF MANDATE

On June 10, 1982, a petition for rehearing was filed in the above styled and numbered cause and this Court having carefully considered the same, finds that the petition should be and is hereby DENIED. The Clerk of this Court is directed to issue the MANDATE FORTHWITH.

Dated this *14th* day of June, 1982.

(s) *Tom Brett*
TOM BRETT, PRESIDING JUDGE

(s) *Tom R. Cornish*
TOM R. CORNISH, JUDGE

(s) *Hez J. Bussey*
HEZ J. BUSSEY, JUDGE, DISSENTS

ATTEST:

(s) *Ross N. Lillard, Jr.*
Clerk

Office - Supreme Court, U.S.
FILED
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STEVAS,
CLERK

No. 82-188

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF OKLAHOMA,
Petitioner,

vs.

CECIL DEJUAN HARRIS,
Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

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November, 1982

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On Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Respondent, Cecil Dejuan Harris, was convicted at his jury trial in the District Court of Cleveland County, Oklahoma of First Degree Rape. His punishment was assessed at five (5) years imprisonment.

From said judgment and sentence the Respondent perfected his appeal to the Oklahoma Court of Criminal Appeals, Case No. F-80-305. The Oklahoma Court of Criminal Appeals reversed Respondent's conviction. A petition for rehearing filed by the Petitioner (State of Oklahoma) was denied, therefore rendering the State Court's determination final. *Harris* v. *State*, 645 P.2d 1036 (Okl.Cr. 1982).

STATEMENT OF THE FACTS

At trial the State attempted to prove its case mainly by the uncorroborated testimony of prosecutrix, a thirteen-year-old stepdaughter of Respondent. She testified that she was awakened by the Respondent one morning during the first week of April, 1979. She followed Respondent to his bedroom where he and the stepdaughter engaged in sexual intercourse. In addition to presenting witnesses establishing his good character, the Respondent presented testimony and documentary evidence that he was out of town when this occurrence was supposed to have happened. The prosecutor, rejecting the trial court's offer to allow him a postponement, commenced to vigorously cross-examine the Respondent and his witnesses on pre-trial silence. As observed by the Oklahoma Court of Criminal Appeals, in their decision, "the prosecutor continued this approach throughout the cross-examination and during closing argument."

ARGUMENT AND AUTHORITIES

The Petitioner contends that under Rule 17 of this Court, certiorari should be granted and the matter remanded as in *Lane* v. *Smith*, ___ U.S. ___, 102 S.Ct. 2898, 73 L.Ed.2d 1310 (1982), previously *United States ex rel. Smith* v. *Franzen*, 660 F.2d 237 (7th Cir. 1981).

The proposition is apparently premised on Rule 17, part c, that the decision of the Oklahoma Court of Criminal Appeals has decided a federal question in a way which may conflict with *Fletcher* v. *Weir*, ___ U.S. ___, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982).

The Respondent submits that the decision of the Oklahoma Court of Criminal Appeals is neither in conflict with, nor adverse to, *Fletcher* v. *Weir*, supra. The rule of *Fletcher* is not applicable to Respondent's case and may be distinguished.

The record and transcripts of the Respondent's trial reveal that he was advised of his rights and this fact was made known to the jury. The prosecution witnesses, Bussey and Detective Bowerman, showed that the Respondent was taken to court-related services where the accused is allowed to have his lawyer present and is advised of his rights (Trial Transcript, p.21). Detective Bowerman testified that the Respondent was her suspect, that she was responsible for him being placed in jail and that she attempted to speak with him while he was incarcerated. He refused (Trial Transcript, pp.29, 30). As early as preliminary hearing, Bowerman was testifying that Respondent refused to discuss the case with her (Preliminary Hearing Transcript, p.11).

While the record does not reflect the perfect textbook recitation of the *Miranda*[1] *warnings*, the showing made, sufficiently triggered application of *Doyle* v. *Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), barring cross-examination by the prosecutor concerning Respondent's pretrial silence to discredit his alibi defense in front of the jury. Because there is some showing that Respondent was advised under *Miranda*, the Oklahoma Court of Crim-

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[1] *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

inal Appeals decision is consistent with the enunciation of limitation set forth in *Fletcher*.

Further, under the facts and circumstances of *Harris*, the Oklahoma Court of Criminal Appeals stated:

> "Here, production of the appellant's alibi evidence not only required him to identify and to authenticate the documents, but to inform state officials of the connection between the documents and his assertion that he was out of town on the days in question. *The documentary evidence was apparently insufficient to establish that fact without some testimony by the appellant. Accordingly, we hold that under the instant circumstances,* the prosecutor's inquiry as to the reasons for the appellant's pretrial silence was improper." *Id.* at 1038 (Emphasis added)[2]

The Respondent submits that *Harris* is, by its very wording, limited to the circumstances thereof and does not create any conflict with the decisions of this Court, and particularly not with *Fletcher* v. *Weir*, supra.

---

[2] The date of the offense was never actually settled until preliminary hearing, and even then some question existed as to the exact date. Discussion thereon was still occurring on the date of trial (Trial Transcript, pp.7,8).

CONCLUSION

THEREFORE, premises considered, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent

November, 1982

CERTIFICATE OF SERVICE

I, J. Malone Brewer, am the Attorney of Record for the Respondent, Cecil Dejuan Harris, and that on November _____, 1982, I served three copies of the foregoing Brief in Opposition, by placing same in a duly addressed envelope with First Class postage fully prepaid, in the United States Mail, to the following named counsel of record shown below:

Jan Eric Cartwright
Attorney General of Oklahoma
112 State Capitol Building
Oklahoma City, Oklahoma 73105

All parties required to be served have been served.

_____

J. Malone Brewer